

Internal Revenue Service

Department of the Treasury
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Date: December 20, 2001

LEGEND:

Authority 1 =

Authority 2 =

State =

a =

b =

Year =

Date 1 =

Date 2 =

Dear :

This is in response to a request submitted by Authority 1 and Authority 2 to void the Form 8328 filed by Authority 1 on Date 2 and to grant Authority 2 an extension of time pursuant to § 301.9100 of the Procedure and Administration Regulations to file Form 8328 in order to make a carryforward election under § 146(f) of the Internal Revenue Code (the “Code”) of \$a in unused private activity volume cap.

Facts and Representations

You make the following factual representations. Authority 1 is a body politic and corporate, established as an agency of the State and authorized to issue qualified private activity revenue bonds on a conduit basis. Authority 1, however, is not authorized to issue bonds to finance student loans. Authority 1 is authorized to allocate certain State private activity bond volume cap among certain authorized bond issuers, including itself.

Authority 2 is a public body corporate established as an agency of the State and

authorized to issue qualified private activity revenue bonds for certain purposes, including the financing of student loans.

On Date 1, the Board of Directors of Authority 1 adopted a resolution to carry forward \$a of the State Year volume cap for the purpose of issuing qualified private activity bonds to finance student loans. On the same day, following the adoption of the resolution and pursuant thereto, the Executive Director of Authority 1 allocated \$b of the unused \$a volume cap to Authority 2 to carry forward to finance student loans. Authority 1 did not allocate the remainder of the unused \$a volume cap (i.e. \$a - b) to Authority 2.

On Date 2, Authority 1 filed a Form 8328 (Carryforward Election of Unused Private Activity Bond Volume Cap) to carry forward the entire \$a unused Year volume cap for the purpose of financing student loans. Subsequently, after the due date to make the carryforward election, Authorities 1 and 2 received advice from bond counsel that Authority 2, as the issuing authority, must make the carryforward election. The preparation and filing of the request for extension of time to make the appropriate election under § 146(f) of the Code followed that advice without unreasonable delay. Prior to filing this request, the failure of Authority 2 to timely file Form 8328 had not been discovered by the IRS.

Law and Analysis

Except as otherwise provided, § 103(a) of the Code provides that gross income does not include interest on any state or local bond. Section 103(b) provides, in part, that § 103(a) shall not apply to any private activity bond that is not a qualified bond (within the meaning of § 141). Generally, under § 141(e) of the Code, a private activity bond is not a qualified bond unless the bond meets the volume cap requirements of § 146.

Section 146(a) provides that a private activity bond issued as part of an issue meets the volume cap requirements if the aggregate face amount of the private activity bonds issued pursuant to such issue, when added to the aggregate face amount of tax-exempt private activity bonds previously issued by the issuing authority during the calendar year, does not exceed such authority's volume cap for the calendar year.

Section 146(f)(1) provides that if an issuing authority's volume cap for any calendar year after 1985 exceeds the aggregate amount of tax-exempt private activity bonds issued during the calendar year (by the authority), the authority may elect to treat all (or any portion) of the excess as a carryforward for one or more carryforward purposes. Section 146(f)(2) requires the issuing authority to identify the purpose for which the carryforward is elected and to specify the portion of the carryforward which is to be used for that purpose. Section 146(f)(5) defines "carryforward purpose" to mean four different purposes, including the purpose of issuing qualified student loan bonds. Under § 146(f)(4), any election (including any identification and specification contained therein), once made, shall be irrevocable.

The election is made by filing Form 8328 with the Internal Revenue Service Center, Ogden, UT 84201. Under Notice 89-12, 1989-1 C.B. 633, Form 8328 must be filed by the earlier of (1) February 15 of the calendar year following the year in which the excess amount

arises, or (2) the date of issue of bonds issued pursuant to the carryforward election.

Section 146(f)(3)(A) provides that if any issuing authority elects a carryforward under § 146(f)(1) with respect to any carryforward purpose, any private activity bonds issued by such authority with respect to such purpose during the 3 calendar years following the calendar year in which the carryforward arose shall not be taken into account under § 146(a) to the extent the amount of such bonds does not exceed the amount of the carryforward elected for such purpose. Section 146(f)(3)(B) provides that carryforwards elected with respect to any purpose shall be used in the order of the calendar years in which they arose.

When a taxpayer makes an election that it is not entitled to make, the election is invalid and the taxpayer is treated as if it had not made the election. See Mamula v. Commissioner, 346 F.2d 1016 (9th Cir. 1965); (taxpayer who elected method of reporting that was not available to taxpayer was not bound by election); Plumb v. Commissioner, 97 T.C. 632 (1991) (taxpayer who elected improper method of carrying over net operating losses was treated as not having made election).

Section 301.9100-1 provides, in part, that the Commissioner of Internal Revenue has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulation, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections that do not meet the requirements for automatic extensions in § 301.9100-2, must be made under the rules of § 301.9100-3. Section 301.9100-3(a) further provides that requests for relief will be granted if the taxpayer provides evidence establishing to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in part, that the taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief under that section before the failure to make the regulatory election is discovered by the IRS.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability than if the election had been made timely (taking into account the time value of money).

Under State law, Authority 1 was authorized to allocate certain private activity bond volume cap among various state issuers, including Authority 2. Authority 1 timely made the allocation of \$b to Authority 2 pursuant to § 146. Authority 1 did not allocate the remainder of the unused \$a volume cap (i.e., \$a - \$b) to Authority 2.

Despite having made the allocation to Authority 2, Authority 1 timely filed a Form 8328 with the IRS to elect to carry forward unused Year volume cap, including the \$b of

volume cap allocated to Authority 2, for the purpose of issuing student loan bonds. Such election was not available to Authority 1 because Authority 2 was the appropriate entity to make the carryforward election for the \$b in unused volume cap and, under State law, Authority 1 was not authorized to issue qualified student loan bonds. Accordingly, we conclude that the election was invalid and Authority 1 should be treated as if it had made no election for the \$a in unused volume cap.

Authority 2, which is authorized to issue qualified student loan bonds, is the proper authority to make the election and file Form 8328 with respect to the \$b in unused volume cap because, under § 146(f)(1), the carryforward election must be made by the issuing authority. Authority 2, however, cannot elect to carry forward the difference between \$a and \$b because it was not allocated that amount.

Under the facts and circumstances of this case, we conclude that Authority 2 acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Conclusion

Based on the facts and representations submitted, we conclude that Authority 2 acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government. However, Authority 2 can only elect a carryforward for the volume cap allocated to it, \$b. Accordingly, the Form 8328 filed by Authority 1 on Date 2 is void and Authority 2 is granted an extension of time of 45 days from the date of this letter ruling to file Form 8328 to carry forward unused volume cap in the amount of \$b.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification upon examination. Except as specifically ruled above, no opinion is expressed or implied concerning this matter under any provision of the Code or the regulations thereunder, including §§ 103 and 146.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. Pursuant to a Power of Attorney on file with this office, a copy of this letter is being sent to Authority 2's authorized representative(s).

Sincerely yours,
Assistant Chief Counsel
(Exempt Organizations/Employment Tax/
Government Entities)
By: Rebecca L. Harrigal
Chief, Tax Exempt Bonds Branch